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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 191

SAMUEL R. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 349–355) is reported at 149 F. 2d 185.

JURISDICTION

The judgment of the circuit court of appeals was entered May 11, 1945 (R. 355), and a petition for rehearing (R. 356–359) was denied June 7, 1945 (R. 360). The petition for a writ of certiorari was filed July 2, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in admitting certain documentary evidence.

2. Whether there was a fatal variance between the information and the evidence adduced in support thereof.

STATUTORY AND OTHER PROVISIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, 28, 33; 50 U. S. C. App., Supp. IV, 904 (a), 925 (b)) are as follows:

> SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act, * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not

more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

The pertinent provisions of Maximum Price Regulation 154, issued May 25, 1942 (7 F. R. 3903–3904),[1] are as follows:

SEC. 1393.1 *Maximum prices for ice.*— On and after May 25, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver ice in the course of trade or business at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Sec. 1393.9; and no person shall agree, offer, solicit, or attempt to do any of the foregoing.

* * * * *

SEC. 1393.9 *Appendix A: Maximum prices for ice—(a) Determination of maximum prices—(1) Generally:* The seller's maximum delivered price and the seller's maximum platform price for any form, quantity, and quality of ice shall be the highest price at which the seller delivered such form and quantity and quality of ice during March 1942 on a delivered sale or on a platform sale respectively to a purchaser of the same general class.

* * * * *

[1] In respect of an amendment of this regulation on July 3, 1942, see footnote 5, pp. 5–6, *infra*.

(b) If the maximum price of ice cannot be determined under paragraph (a) of this section, the maximum price of ice shall be the maximum price of the most closely competitive seller of the same class, for the same form, quantity, and quality of ice.

STATEMENT

An information in 54 counts was filed against petitioner, Riley Johnson, John D. Warner, and Raymond H. Burtz in the United States District Court for the Western District of Louisiana, charging them with wilfully making sales of ice in Lake Charles, Louisiana, from May 25, 1944, to July 7, 1944, at prices in excess of those permitted by Maximum Price Regulation 154, issued by the Price Administrator of the Office of Price Administration pursuant to the Emergency Price Control Act of 1942, as amended, and Executive Orders 9250 and 9328 (R. 2–43).[2] After a trial by jury, each of the defendants, except Burtz, was convicted on counts 1 to 39 and 42 to 54 (R. 344). Petitioner was sentenced generally to imprisonment for six months on counts 1 to 5, and imposition of sentence on the remaining counts was suspended, and he was placed on probation for a period of five years to begin at the expiration of the prison sentence (R. 46).[3] On appeal to the

[2] Counts 1–41 related to wholesale sales; counts 42–54 related to retail sales.

Circuit Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed (R. 349–355).[4]

ARGUMENT

1. Petitioner contends (Pet. 2–4) that the trial judge committed reversible error in admitting in evidence, over his objection, Government Exhibit 2, which purported to be the price list filed by Pure Ice and Cold Storage, Inc. with the local O. P. A. office on June 23, 1942, showing the maximum prices which it charged for ice during March 1942 (see R. 60–66).[5] Petitioner asserts

[3] Johnson was sentenced to imprisonment for two months on counts 1 to 5, and probation was granted as to the remaining counts; Warner was sentenced to imprisonment for three months on count 19, and probation was granted as to the remaining counts (R. 346-347).

[4] The sufficiency of the evidence is not directly involved, and we therefore deem it unnecessary to delineate the evidence. It is summarized in the opinion of the circuit court of appeals (R. 351–352, 354). Such of the evidence as is necessary for a consideration of the questions presented by the petition is set forth in the Argument.

[5] Maximum Price Regulation 154 (pp. 3–4, *supra*) was amended July 3, 1942, so as to provide that the maximum prices for ice should be determined by reference to the highest prices charged for ice during April 1942 (7 F. R. 5139–5141, 5276). The Government did not introduce evidence to prove what the April 1942 prices were for the two companies concerned, i. e., Pure Ice and Service Ice. However, at no stage of the proceeding has petitioner made any point of this, and it is evident that the two companies did not charge any more for ice in April 1942 than they charged in March 1942. The

that the document was inadmissible because it was a copy and no effort was made either to produce the original or to account for its absence. The contention is plainly without merit.

The record does not establish that the document was a copy and not the original. The

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record discloses that both Pure Ice and defendant Warner, doing business as Peoples Ice Co., consented to the entry of decrees which enjoined them from selling ice above ceiling prices (R. 189–190, 232, 295, 299). While the records in the injunction cases were not actually offered in evidence in the criminal case, the defendants did state that they had no objection to the introduction of the complaints and judgments in those cases "to show what the issue was" (R. 190–191).

We have examined the complaints and judgments in the injunction cases. They reveal that the cases were instituted in the same court as the criminal prosecution (Civil Actions 868 and 1027), and that Pure Ice was enjoined from selling ice to dealers for resale at prices above its highest April 1942 price of twenty-five cents per 100 pounds. This was the same as its ceiling price for March 1942 (see Gov. Ex. 2, R. 61–66). These records also show that Peoples Ice Company was enjoined from selling ice in excess of the highest April 1942 prices charged for ice by its closest competitor, Service Ice Company, viz., twenty-five cents per 100 pounds to dealers for resale, and forty cents per 100 pounds for home consumption. These prices were the same as the highest prices charged by Service Ice for ice during March 1942 (see Gov. Ex. 3, R. 66). Accordingly, the March and April 1942 prices were identical, except perhaps in respect of the April 1942 price charged by Pure Ice for ice for home consumption. However, petitioner has at no time claimed that Pure Ice's April 1942 price was higher than its March 1942 price, and there is ample evidence in the record that its March 1942 price for ice for home consumption did not change in April (see, e. g., R. 159, 161, 170, 173).

O. P. A. clerk through whom it was offered, testified that it was the original (R. 60). Nor did her cross-examination prove the contrary. There she merely admitted to a mistaken belief that the document was on the letter head of Pure Ice (R. 62), which was apparently only one of the reasons for her belief that the document was an original. Furthermore, it does not appear that petitioner's objection to the admission of the document rested upon the claim that it was secondary evidence. He objected because the document was "not * * * sufficiently identified as coming from the Pure Ice and Cold Storage, Inc." (R. 63), which also appears to have been the basis of his attack in the circuit court of appeals.[6] Since it is settled that the admission of secondary evidence without objection on that score is not erroneous (*Savage* v. *United States*, 270 Fed. 14, 20 (C. C. A. 8), certiorari denied, 257 U. S. 642; *Thompson* v. *United States*, 256 Fed 616, 620–621 (C. C. A. 2), certiorari denied, 249 U. S. 617), it is now of no moment that the document in question may have been a copy.

2. Finally, petitioner contends (Pet. 2, 4–5) that there was a fatal variance between the offenses charged and the proof adduced by the Government in support of those charges, since the information charged petitioner and his codefend-

[6] That court properly held that there was no merit to the point for the reason that the "evidence sufficiently established the identity of the price list and its authenticity" (R. 354).

ants with substantive violations of the Emergency Price Control Act, while the evidence showed a conspiracy to violate the Act. We submit that there is no merit in this contention.

The information alleged that the defendants jointly committed the violations charged (R. 2–43). While it may be, as stated by the circuit court of appeals, that "the evidence introduced in the trial would have been competent to prove conspiracy" (R. 353), it was also admissible to prove the joint action of defendants.[7] Where persons are associated for a criminal purpose, acts done by any of them with reference to such purpose are admissible, although no conspiracy is charged. *Coplin* v. *United States,* 88 F. 2d 652 (C. C. A. 9), certiorari denied, 301 U. S. 703; *Cossack* v. *United States,* 82 F. 2d 214, 216 (C. C. A. 9), certiorari denied, 298 U. S. 654; *Samich* v. *United States,* 22 F. 2d 672 (C. C. A. 9).

While petitioner suggests (Pet. 4, 5) that he was prejudiced by the fact that the information did not charge a conspiracy, it is plain that there is no basis for the claim. As pointed out by the court below, "No bill of particulars was requested, much evidence was introduced by [petitioner] contrary to and in rebuttal of that of the Government, and [petitioner] makes no contention here

[7] The theory of the Government's case was that defendant Warner and Johnson who were directly implicated in the illegal sales were acting at the behest of petitioner (see R. 352–353).

that he was deprived of evidence otherwise available to him because the bill of information failed to apprise him of the nature of the Government's case" (R. 353–354).

CONCLUSION

The case was decided below in accordance with well-established principles, and there is no conflict of decisions involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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